

Nomopoesis: Church, State and Family Law in the Creation of Modern Greece

This dissertation is a genealogy of Greek family law that seeks to identify the actors and projects that clashed, and eventually compromised over the legal contents of Greek law, producing in the process understandings about who the Greeks are, which in turn contributed to the shaping of the hegemonic discourse of Greek nationalism. The main argument of the dissertation is that Greek lawyers, jurists, and judges in the nineteenth century, were crucial actors in the process of reconceptualizing and then reorganizing social relations on the basis of the national idea, which up until the creation of the Greek state and for a long time after were organized on the basis of local and religious affiliations. The relatively open category of Greekness was given content through a process of negotiation and compromise between different institutional and individual actors such as the Orthodox Church and the Greek state. Family law was at the center of the institutional compromise between the Orthodox Church and westernizing Greeks and Europeans, which in turn produced the ‘marriage’ of Greekness to Orthodox Christianity (pun intended) in the official national identity discourse. This reconceptualization and reorganization stretched all the way to the past, as legal historians began narrating the story of the law of the Greeks as a nation through the years of ‘Turcocracy’, forgetting or papering over in the process the complex and fragmented social realities that the last century of Ottoman rule had produced in the distinct regions that came under the Greek state, which in many cases included not only Churches and priests, but minarets and Islamic judges as well, or very informal arrangements with no officiating authority from any religion.

The elements of the narrative of continuity of the Greek nation through the preservation of a set of family law rules by the Orthodox Church is today an idea that forms part of a hegemonic national discourse, espoused not only by the state and its actors, but by the majority of civil society as well. This is why the national imagination runs out when it comes to the uneasy categories of Greekness suggested by the Catholic populations of Aegean islands, the (remnants) of the Jewish populations in multiple cities around Greece, and most importantly, by the Muslim populations of the border area of Eastern Thrace. Law and legal discourse helped define the contents of this national imagination in ways that today supersede the field of state action and penetrate well into civil society as well.

In this sense, the dissertation is a case study in the contribution of law and legal discourse in the construction of national identity. It is the argument of this dissertation that the legal field in Greece became one of the main domains in which the new mediator of the nation contended with previously existing modes of imagining community and that lawyers, judges, and legal scholars were crucial actors in working out some of the conflicts. The result was a working out of the conflicts at the level of legal theory based on a narrative about the legal past and therefore legal present of the Greeks, which then trickled down to the application of legal rules by the courts. This narrative set the basic terms for negotiating the contents of the civil law of the Greeks, excluding certain things, such as polygamy, from the very beginning as inadmissible, and then setting the terms for the negotiation of a vast amount of legal norms through a long, arduous, triaging that lasted until the introduction of the Greek Civil Code a century and a half later (1946).

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Dissertation outline

The dissertation has six chapters. After developing the concepts of nomopoesis and ethnopoesis that I will be using throughout the dissertation (Chapter I), I offer an account of the conceptual reorganization that legal scholars starting with the first Bavarian minister of justice performed (Chapter II), not only in the present but also in the past of the Greeks, and the elements that this conceptual reorganization left out or backgrounded (Chapter III). Then I turn to the relationship between the nomopoetic narrative that performed this reorganization and the construction of a legal framework in the emerging Greek state.

Following is a more detailed account of the chapters' contents.

In Chapter I I develop the meaning of the terms ethnopoiesis and nomopoiesis that I use throughout the dissertation to describe the process of imagining the nation, and the process of imagining the nation through law respectively. My starting point is Benedict Anderson's framework on the concept of the nation as an imagined community.¹ Anderson described the shifts in consciousness that made possible the emergence of the nation as a new style of imagining political community, giving a compelling account of the parallels between narratives of individual and national selfhood.

Anderson's contribution, that is his capturing of the consciousness element in this new mode of perceiving community, is at the same time his weak point. His emphasis on this monumental shift in consciousness makes him take for granted the completion of the shift at the moment the first national revolutions broke out, and disregard the role of elite groups that used state structures to further their national projects. In this sense, Anderson's work doesn't pay enough attention to the potentially coexisting and often conflicting modes of consciousness, some of which won out over others only through the operation of state structures, like education and the law. This dissertation focuses on the role of law and lawyers in the construction and propagation of a national mode of consciousness in modern Greece, through the creation of a legal field that was based on underlying ideas about a continuous and unified Greek nation.

I use the term ethnopoiesis to bring attention to the interconnected projects of imagining the nation and building the state; while by nomopoiesis I mean to draw attention to the fact that the development of the legal field was part of the larger process of ethnopoiesis, so that nomopoiesis was the process of imagining the nation and building the state through the legal field. The rest of the chapters in the dissertation provide a case study in Greek nomopoiesis, while the first chapter ends with a brief overview of Greek ethnopoiesis in the early nineteenth century as a background to the rest of the dissertation. The goal of the chapter is to provide the framework for studying that "timeless and essential secret",² that the form of the nation as constructed through law has "no essence"³ or that its essence was "fabricated in a piecemeal fashion from alien forms".⁴

Chapter II focuses on the contribution of German legal scholar Georg Ludwig von Maurer (1790-1892) in the process of Greek nomopoiesis. Maurer, already an accomplished legal scholar and public figure in Bavaria, was appointed regent to the first King of Greece, underage prince Otto, son of the king of Bavaria. In his short tenure, Maurer laid the foundations of the Greek legal system by publishing four legal codes. This chapter focuses on another of Maurer's contributions to the creation of the Greek legal system, his book "The Greek People" which is still considered one of the most important sources of information for the law of the Greeks during the Ottoman years. The argument of the chapter is that Maurer's book was not only a thorough overview of the law of the Greek people, but mostly a reconceptualization of the legal history of the region in national terms. Even though the conflation of the Orthodox Ottoman millet with the Greek nation had been

¹ Anderson, *Imagined Communities*, 1991.

² Foucault, *Nietzsche, Genealogy, History. In Language, Counter-Memory, Practice*, 142.

³ *Ibid.*

⁴ *Ibid.*

an idea previously in circulation, Maurer systematized –and through the success of the book- popularized the notion that the Greek people existed as such under the Ottomans, thanks to the separate rules applied to them by the Christian Orthodox Church.

In this chapter, I tease out the elements of Maurer’s “Greek People” that constituted a reconceptualization on the national principle and point to the incoherencies and contradictions that this position generated (conflation of the Orthodox millet with the Greek nation, effacement of the influence of Turkish law, treatment of Christian Orthodox law as national). Maurer’s nomopoetic narrative about the legal history of the Greeks produced the notion of the Greeks as a separate, coherent, unitary nation under the Ottomans. This narrative in turn influenced the development of the Greek legal field in the nineteenth century in ways that I describe in chapters IV and V.

Chapter III is about the ‘memory and forgetting’⁵ that Maurer’s nomopoetic narrative entailed, and thus the obfuscations and mediations that he performed in order for the Greeks to emerge out of the Ottoman years as Maurer’s consistently separate “Greek People”. Reading the collection of customary law that Maurer published in the first volume of the “Greek People” without the national assumption, as well as already published archives from Veria, Thessaloniki, Sisano, the Patriarchal court of the Orthodox Church in Constantinople and various secondary sources on the Ottoman archives from various cities in the region, I revisit the assumption of the completely separate Orthodox millet, which in the nomopoetic narrative equaled the Greek people.

I offer instead an interpretation of the materials that suggests that the legal regulation of the Orthodox Greeks would have looked significantly different depending on location, population and political relations locally and between the specific community and the Ottoman Porte. Where there was significant Ottoman presence in population and administration, the Orthodox Greeks were often enmeshed in a complex interlocking system of legal regulations, which is not accurately captured by the image of the separate Orthodox millet minimally interacting with the Ottoman authorities. In fact, there are structural reasons and plenty of archival indications to believe that the Greek Orthodox would at times have significant incentives to appeal to the Ottoman authorities, including the Islamic judge, precisely in the areas that the nomopoetic narrative deemed as not only in theory but also in fact under the exclusive jurisdiction of the Orthodox Church: engagement, marriage, divorce, dowry, and inheritance. In other areas, the remoteness and seclusion of some communities seems to have led to an autonomous development of customary law, whose roots, however, could not necessarily be traced to Orthodox Christianity or the allegedly western character of the Greeks, as in the case of the Maniats in the Peloponnese who regularly practiced polygamy.

The argument of the chapter is not that the Greek Orthodox were Islamized or Turkified. Indeed, it would be incoherent to do so, since the underlying thesis of the dissertation is that the concept of the Greek people under the Ottomans, acquired its specific content partly through the legal historical narrative that Maurer initiated and other legal scholars furthered throughout the nineteenth century. Rather, the argument is that the materials on the legal history of the Greek Orthodox in the Ottoman era have been consistently read by legal historians under the influence of the nomopoetic lens, which

⁵ Anderson, *Imagined Communities*, 6-7.

assumes the existence of a separate Greek people because of their separate law, and then retrospectively projects that onto the past. Some Greek Orthodox communities had in fact very little contact with the Ottomans, but others lived in a mixed context. The characteristic of the Greek communities under the Ottomans is that they in fact did not exist as national *Greek* communities coherently regulated in matters familial by the Orthodox Church.

Chapter IV turns to the underlying stakes in Maurer's nomopoetic narrative: the relationship between the Church and the emerging Greek state. Maurer's idea that it was the consistent application of family law rules broadly defined that allowed the Greeks to preserve their national essence against the external threat of a barbarian influence was perfectly compatible with the institutional compromise to the problem of Church-State relations that he himself helped devise. The chapter starts with a detailed look at the actors and interests involved in the jurisdictional struggles that broke out between priests and westernizing Greeks during the revolutionary years (1821-1828). The fight revolved around the definition of a civil vs. a religious dispute and the archival material indicates that there was a range of solutions that these opposed actors had in mind. During the years of the first stable *de facto* government (1828-1830) the proposed plans involved mixed jurisdiction of civil courts and priests in the resolution of marital disputes.

Maurer was a key actor in the resolution of the dispute through the creation of a mixed framework for the regulation of Church-State relations. He helped create an autocephalous Church of Greece, which he then proceeded to submit to a mixed regulation by a Holy Synod and the State. In regards to the question of jurisdiction, Maurer's code of civil procedure attributed final adjudicative power to the courts in marital disputes. However, he created an obligatory mediation process before the granting of the divorce by civil courts which embedded the Church in the procedure. More importantly, having essentially conceded in his nomopoetic narrative to the claim that the law of the Church in marital affairs was the law of the Greeks during the Ottoman years, and also the law that helped them preserve the Christian, civilized nationhood intact, Maurer did not create a civil form of marriage, leaving religious entry to marriage the only option. In addition, he adopted the framework of Byzantine laws that the Church had been trying to apply previously as the law of all Orthodox Christians in marital affairs. This in combination with the disappearance of the forum shopping possibilities transformed the law of the Church into the law of the Greeks in a manner much more coherent than had previously been possible. The nomopoetic narrative of Greeks coherently Christian Orthodox in the past helped shape a state strategy aimed at fashioning Greeks coherently Christian Orthodox in the present.

Chapter V turns to the development of modern Greek civil law more generally from the first revolutionary moments to the introduction of the Greek civil code in 1946. The goal of the chapter is to explain how it came to be that the adoption of "Byzantine law" and "customs" as the temporary legal framework of the new state in 1835 resulted in the 'pandectification' of all areas of civil law by the end of the nineteenth century, except the marriage and divorce piece of family law, in which the Byzantine laws promoted by the Church ended up being applied by the courts in a fashion much more coherent and strict than had been previously possible to the Church itself.

Part A of the chapter examines the revolutionary struggles over the definition of a legal system, in order to demonstrate the limited existence of the national consciousness, even as various localities took up arms to throw off the Ottomans.

Part B of this chapter studies the same struggle between these various groups in the definition of the substantive laws that would govern the Greeks. The uncertain ballet between western codes and Byzantine laws in the constitutional texts, evidenced the shifting balance of powers between these groups as the revolution progressed. Despite the ultimate retention of the goal of drafting a civil code on the basis of the French Code Civil by the last constitutional text of 1827 and by the at least nominal adherence to that goal by both governor Kapodistrias (1828-1831) and the first King (1832-1864) Maurer's nomopoetic framework helped push legal developments in the pandectist direction, while the goal of drafting a civil code remained unachieved until 1946.

Part C of this chapter, explains some of the effects of the nomopoetic framework that Maurer constructed on the development of Greek civil law in the nineteenth century. The link he made between Roman law and the Byzantine law that the Church was allegedly applying in cases brought before it, allowed the linkage of Greeks to the west in the legal field. Ironically, the pandectification of civil law that this move allowed affected contract and property law, which during the Ottoman years had been admittedly Ottoman, while the Byzantine rules of family law that allowed the linkage to be made in the first place, were adopted as the family law of the Greeks *tal qual*, without the 'updating' performed for contracts and property. His compromise with the Orthodox Church in issues matrimonial made Orthodoxy central to the construction of a national Greek identity, substantively and institutionally, making the Orthodox Church a force to be reckoned with every time there was a question of legal reform in family law.

Chapter VI develops and illustrates the claim that the nomopoetic narrative consolidated legal consciousness in the national mode in a manner that constrains legal historical imagination on the one hand, and our imagination about legal reform on the other. The effects of the nomopoetic narrative have limited legal historians to the inquiry of the legal history of modern Greeks largely to the archives of the Christian Orthodox Church, following the idea that the Greeks were a completely separate and unified community, regulated in the national mode by their Church. In other instances, legal historical imagination contains anachronistic elements, that take the turn towards the west as a given, even at moments in time when this was pretty much an issue at stake. Certain aspects of Greek family law that became engrained in the modern Greek state's law through appeal to perennial continuity have become particularly entrenched, making reform in these domains and analysis on the basis of potential effects particularly difficult.

The chapter illustrates these claims by analyzing two instances at which the national consciousness played such a role. The first one involved the analysis of a case of breach of promise to marry that happened between two heroes of the Greek revolution, Mando Mavrogenous and Dimitrios Ypsilantes. After analyzing the case and its underlying stakes, I turn to the explanation given to the case by the two twentieth century historians who discovered the case, in order to illustrate the anachronistic effects of the nationalist legal consciousness. The two historians missed the complex context of the institutional competence struggles that were raging at the time between westernizers and priests and instead assumed that the westernizing minister of justice who dealt with the case, *correctly*

rejected a petition seeking the appointment of an ecclesiastical committee to adjudicate the case.

The second example is drawn from the legal reform debates of 1983 on the question of marital property regimes. On that occasion, the feminist call for the establishment of a community property regime was defeated through appeal to the idea that this would be a solution too 'foreign' for the Greeks, who had traditionally used a separate properties system. This assertion in turn, hinged upon the underlying understanding about who the Greeks were, which was forged in the nineteenth century and entailed the exclusion of the Catholics of the islands who did practice community property. On this occasion then, the consolidation of the nomopoetic narrative resulted in a discussion that focused on national identity rather than potential effects, costs and benefits of a proposed legal reform.